

1 I'm able to resolve it, it should be resolved summarily, if
2 I feel I can do it. And when I say that, I mean in terms of
3 whether or not I've got enough information before me. As
4 opposed to keeping that under advisement while the parties
5 are out going through discovery, what with all the problems
6 there are. Well, not to say the history of this case, but
7 the problems that the agency is experiencing at this time.

8 On the other hand, obviously it's got to be
9 resolved, you know, with some deliberate speed and I intend
10 to do that.

11 If I reach a point where I feel that I can't,
12 either I'm going to need more evidence or I feel that I
13 can't resolve it based on the record, I will let the parties
14 know and set up -- perhaps have a short meeting for purposes
15 of setting up a further schedule.

16 But if I do turn this thing down, if I do turn
17 this summary decision down, I would expect to see this case
18 being tried out in California anyway by the early part of
19 June, no later than that.

20 So we could get into a situation where we start
21 negotiating further with Mr. Kay to get information, but I
22 take it that's not what the Bureau was interested in at this
23 point.

24 MR. SCHONMAN: Well, Your Honor, I don't
25 understand the idea of negotiating for information.

1 JUDGE SIPPEL: Well --

2 MR. SCHONMAN: I mean we're involved in discovery
3 when we asked for information. He has an obligation. He
4 has the burden to provide that information.

5 JUDGE SIPPEL: Well, yes he does, but --

6 MR. SCHONMAN: -- it's a situation where Mr. Kay
7 is holding this proceeding hostage.

8 JUDGE SIPPEL: Well, again, I'm not going to
9 characterize it in this setting. I'm not going to
10 characterize it right now.

11 But I'm not saying that there is this option, but
12 there is -- the representation has been made by Mr. Kay that
13 it would take him -- I don't know what the period of time
14 is, 60 or 90 days, to go back and reconstruct. I've been
15 left with the impression from his affidavit and from the
16 pleadings in the case, but primarily from his affidavit --
17 well, maybe not. Maybe it's from an answer to interrogatory
18 -- I am left with the distinct impression that given a
19 period of 60 to 90 days, with some effort, I don't know
20 whether that's small or great, but with some effort on his
21 part, he can reconstruct this information based on what's
22 being asked. In other words, the Interrogatory 4
23 information.

24 Am I right or wrong on that?

25 MR. FRIEDMAN: That's correct. With enough time,

1 he could go out and visit everybody and put together where
2 they are located and on what frequency.

3 JUDGE SIPPEL: And as I read that, it was
4 something like 60 to 90 days. I don't where I got that from
5 but it's in their pleadings someplace.

6 MR. FENSKE: I think the pleading referenced the
7 90-day period. And I would prefer to obviously check with
8 Mr. Kay to see, you know, if he still feels that's a
9 reasonable estimate.

10 JUDGE SIPPEL: And we'd be talking about going
11 back all the way to 1991.

12 MR. FENSKE: It's a tremendously large task.

13 JUDGE SIPPEL: Yes, I understand that. And,
14 again, because of -- well, I don't want to go down -- I
15 don't want to try and paraphrase what's in the affidavit,
16 but I mean he has given time lines, at certain times, for
17 certain periods of time, certain information is available.
18 It's not available for whatever reason because of
19 earthquakes, because his practice is not to retain records.
20 Once a customer goes -- swish, the records go.

21 So, you know, the reconstruction effort, I don't
22 know whether it would solve -- it would be a -- I can't make
23 a determination based on what's been presented to me thus
24 far, so whether or not even that would be fruitful. But
25 that's the kind of thing I was talking about.

1 You have to understand, Mr. Schonman, maybe you
2 look upon it as being an open-and-shut issue, but I can't
3 look at it that way.

4 MR. SCHONMAN: Your Honor --

5 JUDGE SIPPEL: I've got to look at it from a lot
6 of ways, and I'm trying to do that.

7 MR. SCHONMAN: Your Honor, we take very seriously
8 the relief that we're requesting here. That's why we
9 brought down people from Gettysburg, so that you would have
10 all the facts before you. We want you to have all the
11 facts, and we want you to have all the law in front of you
12 because you have a very important task.

13 JUDGE SIPPEL: Well --

14 MR. SCHONMAN: But I remind you that there are two
15 independent bases for resolving this whole case right now.
16 And that even if all this information, all this loading
17 information, that we have been seeking for two years
18 suddenly came in 90 days from now, we still have a violation
19 of 308(b) of the Act.

20 And Mr. Kay has had at least three formal
21 opportunities to come in and explain why he never answered
22 those inquiry letters properly back in 1994. When he filed
23 his motion for a summary decision, he had the burden of
24 showing that he had not violated 308(b) of the Act. He
25 didn't provide any defense at that time. He made a

1 procedural argument that 308(b) doesn't require licensees to
2 answer such letters.

3 JUDGE SIPPEL: I am -- please, let's not go back
4 and rehash what's already in the record. I mean I am very
5 familiar, believe me, with all the correspondence, with all
6 the arguments, and the way things have been bantered back
7 and forth. So I'm not going to get -- and I'm trying to
8 keep away from that.

9 What I'm trying to emphasize is that I have to
10 make a determination as to whether or not the demotion is
11 meritorious, all right. And if I'm wrong, there's time
12 wasted and the case comes back to me.

13 Do you understand? Not to me personally, but it's
14 going to come back into litigation again, all right. So I
15 want to get it right. That's all. It's worth taking the
16 time to do.

17 On the other hand, if I can't resolve it, as I
18 said, I'm going to let you know and we'll have to get back
19 on the litigation schedule.

20 Now, if anybody else has any ideas in terms of
21 what they want to do between now and then, I'm open to that.

22 MR. HOLLINGSWORTH: Well, I would ask, as a matter
23 of housekeeping, do you want for us to agree on dates to
24 reply to the bench memorandum or to give comments on the --

25 JUDGE SIPPEL: I'm going to get to that.

1 MR. HOLLINGSWORTH: Okay.

2 JUDGE SIPPEL: I'm going to get to that.

3 There's a motion to strike that's got -- normally
4 it's a 10-day turnaround time on motions to strike. So
5 you've got a response -- I take it you're responding to
6 that?

7 MR. SCHONMAN: We would like the opportunity.

8 JUDGE SIPPEL: No, you do. I mean that was a
9 motion to strike that came in last week sometime.

10 MR. SCHONMAN: Yes, that's correct.

11 JUDGE SIPPEL: All right. So when you file your
12 opposition to that, I haven't counted the time, but I'd like
13 to get a response to the bench memorandum.

14 Okay?

15 MR. SCHONMAN: Yes, sir. I'm sorry. I didn't
16 realize that you were waiting for a response.

17 JUDGE SIPPEL: No. I don't have -- I mean do you
18 want me to give you a date certain on this? Why don't we
19 give a date certain.

20 Let's go off the record for just a minute.

21 (Whereupon, there was a short recess.)

22 JUDGE SIPPEL: All right. I have set the time for
23 responding to two outstanding matters. One, the pending
24 motion to strike, which a response is going to be due on the
25 9th of February. And also comments on the bench memorandum

1 that was handed up today will come in from the Bureau on
2 that same date, the 9th.

3 All right. And you will call us, as in the past,
4 you will call counsel's office to let them know that they're
5 available, and to be picked up on Friday before the close of
6 business.

7 MR. SCHONMAN: Yes, Your Honor.

8 JUDGE SIPPEL: Okay. All right. As I said
9 earlier and then throughout this, this has been very helpful
10 to me and I think it's going to be very helpful to the
11 record. And I am going to have to -- however, I am going to
12 wait, and I believe it's 10 days on delivery service for the
13 transcript. I mean I'm going to continue to work on this
14 but I'm going to have to wait for that transcript before I
15 make an ultimate resolution.

16 And we're in recess then until further call.
17 Thank you.

18 ALL: Thank you, Your Honor.

19 (Whereupon, at 11:51 a.m., the hearing was
20 concluded.)

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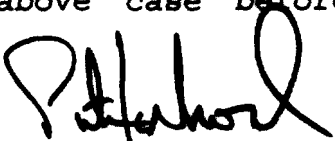
CASE TITLE: JAMES A. KAY, JR., Licenses for 164 Part 90 licenses

HEARING DATE: January 31, 1996

LOCATION: Washington, D.C.

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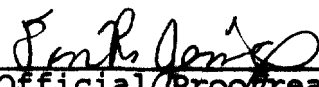


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